IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

EUTIMIO MONTOYA, surviving partner, v. THE UNITED STATES *et al.*	No. 278. Appeal from the Court of Claims.

APPELLANT'S STATEMENT OF CASE, ASSIGNMENT OF ERROR, AND ARGUMENT.

STATEMENT OF CASE.

This is an appeal from the Court of Claims from a judgment adverse to the claimant (32 C. Cls. 349) in a case arising under the Indian Depredation Claims Act of March 3, 1891 (1 Supp. R. S. 913; 26 Stat. L. 851).

The question involved is the meaning of the word "band," in that provision of the first section of the statute confining the jurisdiction of the court to claims for depredations committed by Indians of a "band, tribe or nation in amity with the United States," as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any

band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

The depredation is stated in the findings to have been committed (Rec. 4) "by the Mescalero Apache Indians, who were at the time allied with Victorio's band." The facts relating to the organization and acts of Victorio's band are set forth by the Court of Claims in finding 3 (Rec. pp. 2–4). This consisted of Indians of various Apache tribes or bands, including Mescaleros and Chiricahuas, and of Indians from Mexico, having in no case a majority of any single tribe. Its number varied from time to time, being as few as 13 on June 30, 1879, and over 250 in April, 1880. Its existence dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos reservation, although the exact date of the existence of a cohesive band under Victorio does not appear. Although steadily pursued by the army for two years or more, the band was not finally broken up until the latter part of 1880 by the killing of Victorio and nearly all who were then his followers. Victorio was among the outlaws all this time except about a month, and for the greater part of the time their recognized leader. Its membership likewise varied, being composed at first of only Chiricahua Indians, afterward including some from the Warm Springs Agency, later some of the Mescaleros, and accompanied from time to time by Indians from Mexico. Its objects were lawless,—robbery and murder.

The court holds that the word "band" in the act of March 3, 1891, means, as defined by Webster, "a company of persons united in any common design" (Rec. 10); that the depredation was committed by Victorio's band, and that, in consequence, the amity of Victorio's band is the material subject of inquiry. This band being found hostile, the court holds that it is without jurisdiction.

ASSIGNMENT OF ERROR.

The claimant avers that the court erred in dismissing claimant's petition on the ground assigned, that Victorio's band was not in amity at the date of this depredation, because the Mescalero Apache tribe of Indians, by members of which this depredation was committed, was then in amity, and judgment should have been rendered for the claimant against the United States and this tribe.

ARGUMENT.

It will be seen that this case involves only a definition of the word "band." The question is, however, not of great simplicity, since light on the meaning of this word in its special relation to Indians must be found not from dictionaries, as the Court of Claims has chiefly done, but from the Indian treaties, the laws relating to Indian affairs, the act of 1891 and the interpretation of that act by the courts.

I. The Positions of the Parties.

It is first desirable to find by reference to several adjudged cases exactly what the Court of Claims holds to be the meaning of the word "band." In the present case the "band" had a more or less continuous existence for several years, for a considerable time under the same leader; it was vigorously pursued by the United States army; it committed many depredations; and its members were always regarded as outlaws or robbers deserving extermination.

In the next case on the calendar, No. 279 (Conners *v.* United States, 33 C. Cls. 317) the "band" was a portion of the Northern Cheyenne Indians, called "Dull Knife's band." This band ordinarily lived in a separate hamlet on the reservation under a leader or spokesman without

authority, but had no other separate existence. About half the tribe, including this and three other similar bands, was moved from Dakota to the Indian Territory. There Dull Knife's and Little Wolf's bands were dissatisfied and lived apart from the others. Leaving the reservation together, they separated after two weeks. Each of these bands, upon committing depredations, is treated as a separate band whose amity is material.

In another case, Herring *v.* United States (32 C. Cls. 536) the band was recruited, under a somewhat prominent chief, from different tribes, not comprising a majority of any tribe. It varied in number from 40 to 200. It continued in existence for about two years, engaging continually in robbery and murder, and was frequently in conflict with militia forces. The Court of Claims there gave this definition of a band (p. 538):

"A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief."

The claimant's contention is that "band," named in association with "tribe or nation," is substantially of the same meaning as those words in respect to nationality and means a separate political division of a national character, capable of making treaties or conventions, of holding tribal funds and of declaring war and so recognized by the legislative or executive department of the Government. The claimant asserts that a party of outlawed Indians, made up either from a single tribe or scattered renegades from different tribes, does not

constitute such a band. By national character, is meant that appropriate to a domestic, dependent nation (Cherokee Nation *v.* George, 5 Pet. 1; Rec. 8).

The Indians committing this depredation being of the Mescalero Apache tribe, then in amity but attached to Victorio's hostile band, the court holds that the jurisdiction is defeated by the hostility of Victorio's band, while the claimant asserts that it is maintained by the amity of the Mescalero Apache tribe.

With this understanding of the exact positions of the two parties the meaning of the word can be sought.

II. National Meaning Shown by Uses of the Words Band, Tribe and Nation in Treaties and Statutes.

Use in Treaties.

The Indian treaties contain ample instance of the uses of these words. The oldest generally used the word "nation." See the following instances, the first treaties printed in the Statutes at Large:

1778	7 Stat. L.	13, Delaware Nation.
1784	"	15, Six Nations.
1785	"	16, Wiandot and other Nations.
1786	"	21, Choctaw Nation.
1786	"	24, Chickasaw Nation.
1786	"	26, Shawanoe Nation.
1789	"	28, Wiandot and other Nations.
1789	"	33, Six Nations.
1790	"	35, Creek Nation.
1791	"	39, Cherokee Nation.
1792	"	42, Cherokee Nation.
1794	"	43, Cherokee Nation.
1794	"	44, Six Nations.
1794	"	47, Oneida and Tuscorora Nations.
1796	"	56, Creek Nation.
1797	"	61, Mohawk Nation.

1798	7 Stat. L.	62,	Cherokee Nation.
1801	"	65,	Chickasaw Nation.
1801	"	66,	Chactaw Nation.
1802	"	68,	Creek Nation.
1802	"	70,	Seneca Nation.
1802	"	72,	Seneca Nation.
1802	"	73,	Choctaw Nation.
1803	"	74,	Delawares, Eel River and other Nations.

The only treaties during the period of twenty-five years covered by the foregoing in which the Indian parties are designated as tribes are those of 1795, 7 Stat. L. 49, with the Wyandot and other tribes, which had been called nations in the treaty of 1789 above cited, and that of 1796, 7 Stat. L. 55, with the "Seven Nations or Tribes of Indians denominating themselves the Seven Nations of Canada." That of 1785 with "All the Cherokees" gives no farther designation, but in Art. VI "the nation, or the tribe" is to give up offending members. The treaty next following the last in the foregoing list is that of 1803 with the Eel River and other "nations and also the tribe of the Kickapoos." After this date the Indian parties are called nations or tribes, without any fixed rule, some being nations in one treaty and tribes in the next. Thus the Creeks are called the Creek Nation in the treaties of 1802 (7 Stat. L. 68) and 1826 (7 Stat. L. 286) but the Creek tribe in that of 1832 (7 Stat L. 366).

In the treaty of 1826 with the Belantse-etea or Minnetaree tribe (7 Stat. L. 261) article 7 provides that the Indians will not supply arms to "any nation, tribe or band of Indians not in amity with the United States." This is apparently the first use of the phrase used in the act of 1891 now under discussion.

In the treaties of 1833 and 1834 with the Appalachi-

cola band of Indians (7 Stat. L. 377, 427) the designation "band" is applied to the same Indians who were also parties to the treaty of 1823 (7 Stat. L. 224) entered into with "the Florida tribes of Indians."

The treaty of 1855 with the Blackfoot and other tribes (11 Stat. L. 657) states that it is with the Piegan, Blood, Blackfoot and Gros Ventres tribes and the Flathead nation, consisting of the Flathead, Upper Pend d'Oreille and Kootenay tribes and the Nez Perce tribe. They agree to abstain from hostilities against the following-named nations or tribes of Indians, to wit: "the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arc, and Aunce-pa-pas bands of Sioux, and all other neighboring nations and tribes of Indians."

The treaty of 1864 (16 Stat. L. 707) was with the "Klamath and Moadoc tribes and Yahooskin band of Snake Indians." They are described in the treaty (Art. I) as "the tribes of Indians aforesaid" and (Art. IX) "the several tribes of Indians, parties to this treaty."

The treaty of 1854 (10 Stat. L. 1132) was made with the Nisqually, Puyallup and other "tribes and bands of Indians." The cession of the land is by "the tribes and bands of Indians" and in the covenants both by the United States and the Indians, they are called "the tribes and bands aforesaid."

The treaty of 1848 (9 Stat. L. 949) is with the "four confederated bands of Pawnees, viz.: Grand Pawnees, Pawnee Loups, Pawnee Republicans and Pawnee Tappage." They pledge their fidelity under the name of the Pawnee nation and agree not to make war on tribes "with whom said Pawnee tribes are at peace." The treaty is signed by the chiefs of the four bands separately under the respective names of the bands.

The treaty of 1831 (7 Stat. L. 355) is stated in its caption to be "with the tribe of Shawnee Indians residing at

Wapaghkonnetta and Hog Creek." In the preamble of the treaty and in its first, second, eighth and tenth articles the Indian party is described as "the tribe or band of Shawnee Indians." In the second article it is called "said band or tribe of Shawnees," and in the ninth article "said band of Shawnees."

Such uses of the words "nation," "tribe," and "band" might be multiplied. Those cited authorize the following conclusions:

(1) That nations, tribes and bands alike are recognized as names of proper treaty parties.

(2) That "nation" and "tribe" and "tribe" and "band" are frequently used interchangeably.

An examination of the entire series of treaties with some of the more important tribes will further establish these conclusions and will lead to others. We have selected to this end the Sioux and the Chippewa Indians, with whom many treaties have been made.

SIOUX TREATIES.

1815	7 St. L.	126	Sioux of the Lakes. The Indians are referred to as "the said tribe."
1815	"	127	Siouxs of the River St. Peter's. The Indians are referred to as "the said tribe."
1816	"	143	The parties named are "eight bands of the Siouxs, composing the three tribes called the Siouxs of the Leaf, the Siouxs of the Broad Leaf and the Siouxs who shoot in the Pine Tops."
1825	"	250	Teton, Yancton, and Yanctonies bands of the Sioux tribe of Indians. They agree that their "band or tribe" will never supply arms to "any nation or tribe of Indians not in amity with the United States."

1825	7 St. L.	252	Sioune and Ogallala tribes. The heading of this is: "Treaty with the Sioune and Ogallala tribes," but in the body of the treaty the parties are called "The Sioune and Ogallala bands of the Sioux tribe." They agree that their "bands" will never supply arms to any "nation, tribe or band of Indians not in amity with the United States."
1825	"	257	Hunkpapas band of the Sioux tribe. Similar provision to that in 7 Stat. L. 250.
1830	"	328	Medawah-Kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux and the Confederated Tribes of the Sacs and Foxes.
1836	"	510	Sioux of Wa-ha-shaw's tribe.
1836	"	524	This treaty is made by "the chief braves, headmen, &c. of the Otoes, Missouries, Omahaws and Yankton and Santee bands of Sioux, duly authorized by their respective tribes." The treaty throughout speaks of the parties as "the tribes."
1836	"	527	Wapaakootah, Susseton and Upper Medawakanton tribes of Sioux Indians.
1837	"	542	Yankton tribe of the Sioux Indians.
1851	10 St. L.	949	See-see-toan and Wah-pay-toan bands of Dakota or Sioux Indians.
1851	"	954	Med-ay-wa-kan-toan and Wah-pay-koo-tay bands of Sioux or Dakota Indians.
1851	11 St. L.	749	Sioux and others. See compilation of Indian Treaties (1873), pp. 1047–1050. Treaty is with "the

			following Indian nations," viz: the Sioux or Dakotahs, Cheyennes, Arrapahoes, Crows, Assenaboines, Gros Ventre Mandans and Arrickaras. The Indian parties are uniformly called "the aforesaid Indian nations."
1858	11 St. L.	743	Yancton tribe of Sioux or Dacotah Indians. They are to cease depredations on the property "of any other tribe or nation of Indians."
1858	12 St. L.	1031	Mendawakanton and Wahpakoota bands of the Dakota or Sioux tribe of Indians.
1858	"	1037	Sisseeton and Wahpaton bands of the Dakota or Sioux tribe of Indians.
1865	14 St. L.	695	Minneconjon band of Dakota or Sioux Indians. Controversies between "The Minneconjon band of Dakota or Sioux" and "other tribes of Indians" are to be peacefully settled.
1865	"	699	Lower Brule band of Dakota or Sioux Indians. Contains the same provision.
1865	"	723	Two Kettles band of Dakota or Sioux Indians. Same.
1865	"	727	Blackfeet band of Dakota or Sioux Indians. Same.
1865	"	731	Sans Arcs band of Dakota or Sioux Indians. Same.
1865	"	735	Yanktonai band of Dakota or Sioux Indians. Same.
1865	"	739	Onkpahpah band of Dakota or Sioux Indians. Same.
1865	"	743	Upper Yanktonais band of Dakota or Sioux Indians. Same.
1865	"	747	O'Gallala band of Dakota or Sioux Indians. Same.
1867	15 St. L.	505	Sissiton and Warpeton bands of Dakota or Sioux Indians.

1868	15 St. L. 635	In the introductory paragraph of the proclamation of this treaty the parties named are the "different tribes of Sioux Indians"; in the heading of the treaty they are called the "different bands of the Sioux nation of Indians." In Article VI the language is "said tribes of Indians" in one place and in another it is "of any band or tribe that is or shall hereafter become a party." Article IX speaks of "the tribes who are parties to this treaty." It is signed on behalf of the various "bands."
1874	18 St. L. 167	In the act of Congress of June 22, 1874, appropriations for support, use the following descriptions: "Sioux of Different Tribes," "different bands of the Sioux Indians," "Sisseton and Wahpeton bands of Sioux Indians" and "Yankton tribe of Sioux." Similar language is used in other appropriation acts.
1876	19 St. L. 254	The agreement of September 26, 1876, ratified by act of February 28, 1877, is made with "the different bands of Sioux Indians."

Here attention is particularly asked to the treaty of 1868, made with "the different bands of the Sioux nation," but described in the proclamation as "the different tribes of the Sioux nation." In general, the same indiscriminate use of these words appears. The Yanctons in these treaties and laws as cited are three times called the Yancton tribe and three times the Yancton band.

CHIPPEWA TREATIES.

1785	7 St. L.	16	Delaware, Chippawa and Ottawa nations of Indians. If any Indians commit a robbery, the "tribe" shall deliver them up.
1789	"	28	Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac nations.
1795	"	49	Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas and others. The Indian parties in this treaty are referred to uniformly as Indian tribes.
1805	"	87	Wyandot, Ottawa, Chipawa and other nations. The Indian parties here are throughout designated as "Indian nations."
1807	"	105	Ottoway, Chippeway, Wyandotte and Pottawatamie nations of Indians. The words "Indian nations" are used throughout.
1808	"	112	Chippewa, Ottawa and other nations of Indians.
1815	"	131	Wyandot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, Potawatimie tribes of Indians. Although designated as above in the caption the description in the introductory clause of the treaty is "the Chippewa, Ottawa and Potawatimie, tribes of Indians together with certain bands of the Wyandot, Delaware, Seneca, Shawanoe and Miami tribes." Article 3 refers to the fidelity to the United States manifested by the Wyandot, Delaware, Seneca and Shawanoe tribes, and article 4 recites an agreement between "the United States and the before-

			mentioned tribes or nations of Indians."
1816	7 St. L.	146	The united tribes of Ottawas, Chippewas and Pottowotomees.
1817	"	160	Wyandot, Chippeway and other tribes of Indians. The word "tribes" is used throughout.
1818	"	178	Deleware, Potawatamie and Chippewa tribes of Indians.
1819	"	203	The Chippewa nation of Indians.
1820	"	207	The Chippewa tribe of Indians.
1821	"	218	The Ottawa, Chippewa and Pottawatamie nations of Indians.
1825	"	272	Sioux and Chippewa and other tribes.
1827	"	303	Chippewa and other tribes.
1828	"	315	United tribes of Potawatamie, Chippewa and Ottawa Indians.
1829	"	320	The united nations of Chippewa, Ottawa and Potawatamie Indians.
1833	"	431	The united nation of Chippewa, Ottowa and Potawamie Indians. This refers to "the Chippewa tribe."
1833	"	442	The united nation of Chippewa, Ottowa and Potawatamie Indians.
1836	"	491	Ottawa and Chippewa nations of Indians. Article 1st speaks of the Indian parties as "nations" but article second calls them "tribes."
1836	"	503	The Swan Creek and Black River bands of the Chippewa nation.
1837	"	528	The Saganaw tribe of the Chippewa nation. This treaty contains a schedule of payments to chiefs "representing the several bands of the tribe of the Saganaws."
1837	"	536	The Chippewa nation.
1838	"	565	The several bands of the Chippewa nation comprehended within the district of Saganaw.

1839	7 St. L.	578	The Saganaw tribe of Chippewas.
1846	9 St. L.	853	The various bands of the Pottowautomie Indians known as the Chippewa, Ottawas and Pottowautomies and others, hereafter to be known as a nation to be called the Pottowautomie nation. The caption of the treaty describes the Indian parties as "various bands of the Pottowautomie, Chippewa and Ottawa Indians." Articles 1, 2 and 3 refer to "the said tribes of Indians." Article 4 to "the said united tribes of Indians." Article 5 to "said nation of Indians" and article 6 to "the said tribes of Indians."
1847	"	904	The Chippewa Indians of the Mississippi and Lake Superior. This treaty does not designate them either as band, tribe or nation.
184[illegible]	"	908	The Pillager band of Chippewa Indians.
1854	10 St. L.	1109	The Chippewa Indians of Lake Superior and the Mississippi. This treaty contains one article of agreement between the Chippewas of Lake Superior and the Chippewas of the Mississippi and settles a separate tract for each of a number of bands including the following: L'Anse, Vieux De Sert, La Pointe and Fond Du Lac.
1855	"	1165	The Mississippi Pillager and Lake Winnibigoshish bands of Chippewa Indians. This treaty grants separate reservations and annuities to these bands and the bands bind themselves not to commit depredations.

1855	11 St. L.	621	The Ottowa and Chippewa nations of Indians. This makes separate provision for the six bands residing at or near Sault Ste. Marie, the Beaver Island band and other bands. This treaty contains a provision that the tribal organization of the Ottowa and Chippewa Indians is dissolved and that further negotiations shall not be with a general convention of Indians but with those residing in the vicinity of any usual place of payment or immediately interested in the questions involved without the concurrence of other portions of their people. The treaty is severally signed in behalf of various bands named.
1855	"	631	Chippewa Indians of Sault Ste. Marie.
1855	"	633	The Chippewa Indians of Saginaw and that portion of the bands of Chippewa Indians of Swan Creek and Black River. This is signed separately in behalf of the Saginaw bands and the Swan Creek and Black River bands.
1859	12 St. L.	1105	The Swan Creek and Black River Chippewas. This treaty refers to the Swan Creek and Black River bands of Chippewas and unites the Munsee Indians with "the aforesaid band of Chippewas."
1863	"	1249	The Chippewas of Mississippi and the Pillager and Lake Winibigoshish bands of Chippewa Indians. This refers to various bands of Chippewas of the Mississippi and is signed severally for eight bands.

1863	13 St. L. 667	Red Lake and Pembina bands of Chippewa Indians.
1864	" 689	Red Lake and Pembina bands of Chippewa Indians.
1864	" 693	Chippewas of the Mississippi and Pillager and Lake Winnebagoshish bands of Chippewa Indians.
1864	14 St. L. 657	The Chippewas of Saginaw, Swan Creek and Black River.
1866	" 765	The Bois Forte band of Chippewa Indians.
1867	16 St. L. 719	Chippewa of the Mississippi. These Indians are referred to as the Chippewas of the Mississippi bands. A provision also occurs relative to "any person not a member of the Chippewa tribe."
1889	25 St. L. 642	The act of January 14, 1889, "for the relief and civilization of the Chippewa Indians in Minnesota" directs negotiations "with all the different bands or tribes of Chippewa Indians in the State of Minnesota.
1891	26 St. L. 992	In the Indian appropriation act of March 3, 1891, appropriations are made for the following Chippewa Indians: "Chippewas of the Mississippi," "Chippewas, Pillagers and Lake Winnebagoshish bands," "Chippewas of Red Lake," "Chippewas of Lake Superior," "Pembina tribe of Chippewas," "Otter Tail, Pillagers, Pembinas and Mississippi River Indians on the White Earth reservation," "Turtle Mountain band of Chippewas."

Uses In General Statutes.

In the general laws applicable to the management and government of Indians, the word ordinarily used is

"tribe," but both "band" and "nation" are used synonymously. In the provisions of the Revised Statutes relating to Indians, many such instances occur.

R. S. § 2079 (act of March 3, 1871) declares that "no Indian nation or tribe" shall be acknowledged as "an independent nation, tribe or power."

R. S. § 2080 (act of July 5, 1862) declares:

"Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized by proclamation to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done with good faith and legal and national obligations."

If the meaning of Congress in the enactment of this statute should be limited to tribes so described in the treaties, there is no provision for action against hostile "bands" or "nations."

R. S. § 2097 (act of July 26, 1866) provides that no funds belonging to any Indian tribe shall be applied otherwise than as stipulated in a treaty or by an express provision of the law.

In the very section R. S. § 2156 (act of June 30, 1834) which the Court of Claims has declared to be the measure of liability for Indian depredations, the words tribe and nation are used synonymously. Provision is made for compensation for depredations by "any Indian belonging to any tribe in amity with the United States"; but on complaint the Indian agent is to "make application to the nation or tribe"; and "if such nation or tribe" should neglect or refuse to make satisfaction, further steps should be taken.

The uses of these words in statutes are practically the same as we have found in treaties and lead to certain unassailable conclusions.

Definitions Drawn From Treaty and Statute.

With all these instances of the use of the words nation, tribe and band, the following conclusions may now be positively accepted:

(1) That treaties were made with Indian parties alike under the names of nation, tribe and band, each designating an organization recognized as having a separate political existence.

(2) That "tribe" was used interchangeably both with "nation" and with "band," being a generic term for the treaty party.

(3) That "tribe" sometimes designated a division of a nation and "band," sometimes a division of a tribe, and sometimes of a nation, having in either case separate treaty-making capacity.

III. National Meaning Shown by Use of Word "Band" in Act of 1891.

This now leads us directly to the use of these words in the act of March 3, 1891. We maintain that that act shows on its face an intent to use the word "band" in the sense used in these treaties, and as we have already defined it (*ante*, p. 4), an organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government. This latter we deem essential to a complete definition of the term, although not necessary to the adjudication of the present case. The words band, tribe or nation, we assert, are synonymous in requiring national character, although differing in degree and each alike refers to a "domestic, dependent nation" as defined by this court in Cherokee Nation *v.* Georgia (5 Pet. 1; Rec. 8).

We do not deny that the definition of the Court of Claims, derived from the dictionaries, "a company of persons united in any common design" is a correct definition of the word "band" in certain uses. The Indians under Victorio may properly be called Victorio's band, but the word is used in the act of 1891 in the special meaning affixed to it by long usage in connection with Indian affairs. This will appear by an examination of the act itself.

Association of Words Implies Likeness.

The words "band, tribe or nation" appear in but one place in the act of March 3, 1891. Tribe and nation always have a national meaning. "Nation" is the term of the greater dignity, indicating a body politic either among white men or Indians. "Tribe" is equally a national designation, but appropriate only to savages. "Band," although also used in the sense defined by the Court of Claims, has the same national meaning in treaties, substantially equivalent to tribe. Placed here with "tribe" and "nation," both of which possess an exclusively national meaning, it should be considered as having a like national significance. It equally designates a separate political existence, but, as "tribe" is less dignified than "nation," so "band" generally possesses less dignity than "tribe," although none the less a designation of nationality.

This is a case for the application of the maxim *noscitur a sociis*. The rule is admirably stated in Black's Interpretation of Laws, page 135:

"Associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it."

Nesbitt *v.* Lushington (4 Durn. & E. 783) was a case where corn forming a part of a cargo protected by a policy of marine insurance was seized by a mob off the coast of Ireland during the famine. In a suit on the policy, Lord Kenyon, C. J. said (p. 787):

"That which happened in the case, does not fall within the meaning of 'arrests, restraints and detainments of kings, princes, and people.' The meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis;* it means 'the ruling power of the country.'"

Buller, J., concurring (p. 788), said:

"Then having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes and people, of what nation, condition, or equality whatsoever.' Those words, therefore, must apply to 'nations' in their collective capacity.'

It was also decided by Lord Tenterden (Cotton *v.* James, Mood & M. 273) that a statute of bankruptcy, declaring that any fraudulent "gift, transfer or delivery" of property shall constitute an act of bankruptcy, applies only to such deliveries as are in the nature of a gift, such as change the ownership of the property, to the prejudice of creditors; it does not include a delivery to a bailee for safe keeping.

The opinion says:

"This is no act of bankruptcy. The word 'delivery' is one certainly of very general signification; but standing as it does in the statute 6 G. 4, C. 16, § 13, connected with the words 'gift or transfer,' I incline to think it must be confined in interpretation to transactions of the same nature."

The doctrine is clearly applicable here. The word "band" is to be construed in the light of the general

meaning of its associated words as possessing the characteristic common to them, separate nationality. The purpose of Congress was to say that the amity to be found in any case was to be that of the political body to which the depredator belonged. The word "band" was put in because that is one of the names by which the treaty-making parties are designated in treaties. To give to the word "band" in this connection the meaning of a gang of thieves or a village community is to put it in a classification entirely apart from the associated words.

"Tribe" Used as a Synonym for "Band, Tribe or Nation."

After its use in this place the word "nation" disappears from the act. "Band" is used but once more, and then in connection with "tribe." The claimant is directed in § 3 to set forth in his petition the "tribe or tribes or band of Indians" committing the depredation. Why was nation omitted? Because the whole meaning of nation was expressed in "tribe or band." The word tribe is used alone in the remaining places in the act, because it includes in the one word both nation and band, as a separate political organization.

Section 5 provides for the determination by the court of the value of the property taken and destroyed "and, if possible, the tribe of Indians" by whom committed and judgment shall be rendered "against the tribe of Indians." Section 6 provides that the amount of the judgment "rendered against any tribe of Indians" shall be charged against "the tribe," and provides for its payment from "annuities due said tribe" or "any appropriation for the benefit of said tribe." It further provides that the amount shall remain "a charge against such tribe" and be deducted from funds hereafter due "such

tribe." By § 10 a right of appeal is given to "the tribe of Indians."

The simplest way in which these provisions can be understood is that the same body of Indians the amity of which is to be determined is the body to be charged in the petition with the depredation, against which a judgment is to be rendered, from whose funds the amount of the judgment is to be deducted, and to whom is given a right of appeal to this court from an adverse decision below.

The word "tribe" must indeed include "band" as used in all these places. Suppose, for instance, a depredation were committed by members of the Pillager band of the Chippewa tribe, after the dissolution of the tribal organization in 1855 (11 Stat. L. 621; *ante*, p.) and after the official recognition of that band by the treaty of 1865 (12 Stat. L. 1249; *ante*, p.). They were then members of a band but not of a tribe. The amity of that band, all are agreed, would have to be found under § 1 and, under § 3, the claimant would have to set forth that band in his petition; but would it not be the court's duty under § 5 to find this band as committing the depredation and to render judgment against it, although the law uses the word "tribe"? The judgment against the band would under § 6 be charged against the funds of the band, and the band would have a right to appeal. All this would be because the word "tribe" comprehends all Indian bodies, whether called "nation," "tribe" or "band," having a separate political organization and capable of making a treaty, holding funds or being sued for the trespasses of its members. In just this way is the word "tribe" used throughout the opinion of this court in Marks *v.* United States (101 U. S. 304).

It is therefore insisted that "tribe" used later in the act includes "band," tribe or nation" and that each

word alike is used in a national sense. One word of the group can not be given a wholly separated meaning.

"Amity" Implies Nationality.

The very use of the term "in amity with the United States" implies sovereignty, although limited, or nationality, although dependent. An individidual can not be spoken of as in amity or at peace with the United States. This is said only of a nation. It can not correctly be said of a band of cut-throats or an organized gang of burglars. This court, in Marks *v.* United States (161 U. S. 304) treats these words as the opposite of "in hostility with the United States." This emphasizes the idea of national existence or sovereignty. If a band of murderers and robbers like Victorio's, whether white or Indian, is engaged in law breaking, its violations of law do not rise to a dignity which entitles it to be said "to be engaged in hostility."

Victorio's Band Had No Nationality.

But this band of Victorio's had no national existence; its organization was for robbery and murder. A nation must at least have territory and citizenship; but Victorio's band had no ground which it could call its own, and all its members belonged to some nation, tribe or band of Indians. They absented themselves awhile from the territory of their tribe and from association with its law-abiding members, but they neither forsook their membership in the tribe nor their right to a place in its territory. Victorio's band was not the kind of a band referred to in the many treaties already cited.

IV. National Meaning Shown by Prior Statutes in Pari Materia.

This view of this act is confirmed also by previous legislation on the same subject. The second paragraph

of the act of March 3, 1891, grants jurisdiction to the Court of Claims to consider also claims arising under the act of March 3, 1885 (23 Stat. L. 376). This provides for the examination of claims "chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States," and the Secretary of the Interior is then directed to report "by what tribe such depredations were committed."

This act, it will be seen, uses only the word "tribe" and the responsibilities to be considered are tribal responsibilities, but can it be questioned that the word "tribe" in this case means any treaty party, whether designated as band, tribe or nation? But it is equally clear that it does not mean a depredating band of renegades like Victorio's; they had no tribal obligations.

The Court of Claims has declared in many cases that the act of 1891 does not grant rights but gives a remedy. This is stated in Corralitos Stock Company, *v.* United States (33 C. Cls. 345):

"Every claim here pending under the remedial statute of 1891 must turn back to the statute of 1834 to establish a right of recovery. This act limits the claims to those arising from depredations committed by 'any Indian or Indians belonging to any tribe in amity with the United States' and fixes the place of loss as "within the Indian country,' or any 'State or Territory inhabited by citizens of the United States.'"

The same doctrine is expressed in McKinzie *v.* United States (34 C. Cls. 285):

"The act of 1891 (26 Stat. L. 851) did not create liabilities. The jurisdictional statute merely provided a method of adjudicating the claims for payment as they already existed as liabilities of the depredators."

The provision of the act of 1834 on which the court

holds that the rights of claimants depend (act of June 30, 1834, § 17, 4 Stat. L. 731), uses the word "tribe" alone. If the Court of Claims' decision in the present case is correct, an entirely new condition was introduced in the remedial act. Whereas, under the act of 1834 this claimant could have recovered on showing that the tribe was in amity, that court says that under the act of 1891 he must show that the marauding band to which the depredating Indians were temporarily attached was in amity, whatever the status of the tribe. It can not be doubted that the word "tribe" in the act of 1834 included nation, tribe or band, wherever national capacity existed. So equally does the expression of these three words in the act of 1891 include in each alike the idea of a national organization. Both acts make the same test of amity, that of the body politic of which the depredators were members.

V. National Meaning Shown by Treaty Provisions in Pari Materia.

In Leighton *v.* United States (161 U. S. 291) this court said (p. 296):

"Many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise."

See similar references to such treaties in Leighton *v.* United States (29 C. Cls. 331).

In many of these treaties the provision holding the Indians to account for depredations is in these or similar words:

"Should any one or more of them violate this pledge * * * the property taken shall be returned, or in de-

fault thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities." (Revision of Indian Treaties, pp. 381, 328, 463, 538, 563, 568, 627, 640, 653, 726, 803, 805, 980, 982, and 1045.)

In others the provision is in these or similar words:

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one * * * subject to the authority of the United States * * * the Indians herein named solemnly agree that * * * the person injured shall be reimbursed for his loss from the annuities, or the monies due or to become due to them under this or other treaties made with the United States." (Revision of Indian Treaties, pp. 137, 319, 328, 528, 915, 932, 984.)

This was the language considered in Marks *v.* United States, 161 U. S. 299.

All these treaties, whether made with the Indians designated as bands, tribes or nations, are based on the theory of a national responsibility for the acts of the members of the band, tribe or nation making this provision. The protection is against the acts of "any one or more of them" or of "bad men." It makes no difference whether a single Indian was the wrongdoer or whether a number of wrongdoers united in a tribe and forming a band for a common object commit the depredation; in either case the tribe itself became responsible. If the wilful acts of the bad men in violation of law continue to such an extent as to oblige troops to be called out against them, this creates no new nationality, nor does it relieve the existing tribe from responsibility in accordance with treaty stipulation. The decision of the Court of Claims introduces an entirely new element into the subject of tribal responsibility for depredations and gives relief to the tribe from its treaty stipulation, if the "bad men" are

numerous and maleficent enough to require armed intervention to stop their murderous proceedings.

The true reading of the act of 1891 treats the tribe responsible under these treaties as the body whose amity or hostility is material.

VI. Results of the Court's Construction.

The Court Disregards the Permanent Relation.

In the present case the court finds that the Indians who committed this depredation were members of the Mescalero Apache tribe and formed a part of Victorio's predatory band. Victorio's band was hostile; the Mescalero Apache tribe was in amity. Whose amity is to be determined? If these depredating Indians belonged to the Mescalero Apache tribe the court has jurisdiction, and that tribe is liable because in amity. If they are regarded as members of Victorio's band, that being hostile, the court has no jurisdiction. Does the court give any reason why the band's hostility should overcome the tribe's amity? The depredating Indians' allegiance to the Mescalero Apache tribe is permanent; their relations to Victorio's band were temporary. Why should the temporary membership govern rather than the permanent? The intent of the act is clearly shown by associating band, tribe and nation together, and the question for determination is the amity of that organization to which the depredators belonged, which had the characteristics common to these three designations; such as national existence, treaty-making power, or the capacity to hold funds. The Court of Claims, on the contrary, disregards the membership of these Indians in the Mescalero Apache tribe, where is their real allegiance, overlooks the amity of that tribe, and holds that the material fact is their

temporary association with a band of cut-throats engaged in lawbreaking and pursued by the army.

If "band" be used in this act in the sense asserted by the Court of Claims, the number is quite immaterial. When Victorio's band consisted of but 13, it was, if the Court of Claims be correct, as much capable of waging war and making peace as when it had over 200 members. If we so define the word, it may be supposed that a claimant may be denied compensation for a loss occasioned by five individuals declaring themselves hostile, out of such a nation as the Sioux, let us say, with its forty thousand other members quiet and at peace.

The logical result of the decision rendered in this case leads to such conclusions that its premises must be held unsound. The word "band" is used in this act in a political sense, and not in that of the lexicographer; it denotes a body having a separate political existence, which may be held to liability and may be used interchangeably with tribe and nation, in just the same meaning as in the laws of the land from the earliest days.

The Court's Construction Disregards Belligerent Rights.

Another consequence results from the doctrine of the Court of Claims in this case, demonstrating its incorrectness. If an organization of Indians possessing national characteristics and called either "nation," "tribe" or "band," is at peace, the law makes it answerable for depredations by its members. The court below holds in this case that if some of its members associate themselves with others from other tribes and enter on a career of depredation and murder and are pursued by the army, the tribal responsibility ceases. It is rather a startling consequence that tribal responsibility is lost without the act

of the tribe or the permanent severance of the member from the tribe.

The converse of this position is equally untenable. If a tribe engages in war, the act of 1891 provides, it is not responsible for the depredations of its members. Yet the Court of Claims must, to remain logical, hold that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. How can it be that belligerent rights of the tribe are lost by the acts of a minority in opposition?

The correct rule is that the body whose amity is to be found is the body answerable for the depredation and that this is the body, whether called nation, tribe or band, which has a capacity for treaty-making and for holding funds as a separate political organization.

Possibly it may be said, in response to this view, that the marauding band whose amity the Court of Claims says is at issue is the party defendant which is to be charged with responsibility. That, indeed, seems to be the position taken by that court in Salois *v.* United States, 33 C. Cls. 335. But the temporary purpose and varying constituency of such a band, as in the present case, render it impossible to make it a party defendant. Where is Victorio's band to-day? Its existence, too, was unlawful from the beginning and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself. But the suggestion may be conclusively answered by noting that the act of 1891 uses tribe alone in designating the responsible party and that this word may appropriately include a band of national character, but can not include a marauding band of thieves like Victorio's.

The Reason for Belligerent Rights.

Special force is given to this by considering the reasons underlying the distinction in responsibility on account of amity or hostility. Why is a tribe committing depredations in a state of flagrant war not answerable for losses occasioned by it, while the tribe is answerable if the depredations are committed by its members in time of peace? This has been well stated by the Court of Claims in the elaborate opinions in Leighton *v.* United States (29 C. Cls. 288) and Love *v.* United States (29 C. Cls. 332), the former affirmed by this court (161 U. S. 291). The court say in the Leighton case (p. 325):

"The Indians being within the jurisdiction and control of the United States as 'domestic dependent nations,' it is their duty to submit to the constituted authorities; but if, instead of submitting, they resort to arms, as a band, tribe, or nation, to maintain or contest their rights, a want of amity *in fact* arises, and by reason of their recognized tribal relations by the political departments of the Government and the favorable rules of interpretation to which they are entitled, their rights as belligerents will be respected by the court in construing the remedial act of 1891."

In the Love case, they say (29 C. Cls. 348):

"Where war and not amity was the international condition of the time and the taking or destruction of property was the exercise of a belligerent right, the loss, like the losses of other citizens in other ways, must be borne by him on whom it falls, unless the Indian defendants assumed a liability for war indemnities by treaty or it was imposed as a condition to peace. Conversely, the Indian defendants can not set up their own unlawful acts of violence as a defence. To avoid liability they must show, or it must appear, that the depredation was the taking or destruction of property in the exercise of a belligerent's right to wage war."

It thus seems that the Court of Claims has recognized that the very ground of the freedom of the tribe from responsibility in war rests upon belligerent rights as recognized in international law. The tribe is not responsible for war losses because it has a right to declare war, and depredations thereafter are an incident to war. This is a doctrine based, indeed, on the very early decisions of this court (Cherokee Nation *v.* Georgia, 5 Pet. 1; Worcester *v.* Georgia, 6 Pet. 515) referred to in the opinion in this case (Rec. 8). The reason of the statutory distinction has not been as fully stated by this court, but it appears in the reasoning of the court in Marks *v.* United States (161 U. S. 302). Viewing therefore the immunity of the tribe from liability in war as based upon its belligerent rights, it necessarily follows that the right can only arise on behalf of some organization of capacity to declare war and peace. It is wholly inconsistent with this reason to hold that belligerent rights may arise on the part of a body or band of Indians which had none of the attributes recognized in Worcester *v.* Georgia (6 Pet. 548) quoted by the Court of Claims in this case (Rec. 8) where in reviewing the policy of Great Britain in relation to the Indians adopted by this country, this court said:

"She considered them as nations capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligation of which she acknowledged."

The language quoted further in the same passage and that from Holden *v.* Joy (17 Wall. 211) also quoted, marks this distinction.

No Belligerent Rights in this Case.

A band of outlaws made up from turbulent elements of various tribes has no right to declare war or make peace.

In this case the Chiricahua and Mescalero Apaches as Indian tribes were at peace. Their majorities remained on their reservations. The case was that described by the Court of Claims in the opinion already cited in Leighton *v.* United States, 29 C. Cls. 326:

"In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

A few turbulent spirits left the reservations, joined others of like character from other reservations, broke the laws of the United States, robbed and murdered citizens and defied the soldiers, acting as military police, sent after them. It can not be said that with this organization for purposes of plunder arose a new Indian nation with whom treaties were to be made and who were to be recognized as lawfully robbing and murdering in the exercise of belligerent rights. Could they gain a new political existence because the United States uses its army as a police force against Indians? There is certainly no fact shown in the history of these Indians either in the findings of the Court of Claims or elsewhere to indicate that the political branch of the Government regarded them as other than law-breakers to be subdued. They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victorio, they returned to their reservations and resumed their relations with the Mescalero or Chiricahua or other tribe to which they belonged.

Thus we see that the very reason for granting belligerent rights is wanting in the case of a disorganized and robber

band without national character. The responsibility of the tribe to which these Indians belonged, for their depredations, is not changed. The tribe itself has not declared war. Its responsibilities are not reduced by the union of its renegades for whose depredations it is responsible with other renegades from other tribes, requiring together pursuit by the army.

The law makes the band, tribe or nation to which the depredator belongs responsible for his acts so long as it is in amity. That responsibility ceases only when the band, tribe or nation itself engages in hostility. The very occasion for the exercise of the responsibility is the wrongdoing of the individual.

VII. Recognition by the Political Departments.

In our definition of "band" (*ante* p. 4) we stated that the band contemplated in the act must be one which had been recognized by the political department of the Government. That is not a part of the definition essential to the decision of the present case, since Victorio's band had none of the characteristics of a band, tribe or nation such as the act of 1891 contemplates. It is none the less a material element in a correct definition. This court has in numerous cases held that the recognition of political rights devolves upon the political department of the Government. In Holden *v.* Joy (17 Wall. 211) this court said (p. 242):

"Laws have been enacted by Congress in the spirit of those treaties, and the acts of our Government, both in the executive and the legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts."

In Fellows *v.* Blacksmith (19 How. 366) the court thus

declares (p. 372) the bonds between the political and judicial departments in the ratification of an Indian treaty:

"An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and headmen of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress."

In the case of United States *v.* Holliday (3 Wall. 407) this court said on this point (p. 419):

"The facts in this case certified up with the division of opinion, show distinctly 'that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved.' In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress."

The same doctrine was declared in the case of the Kansas Indians (5 Wall. 737).

It is not claimed that the only bands, tribes or nations whose amity is to be found under the act of March 3, 1891, are those with which treaties have been made. The

Court of Claims in Graham *v.* United States (30 C. Cls. 333), declares very soundly as follows:

"By this treaty 'with the representatives of the Sioux Nation,' *i. e.*, the chiefs and headmen of the 'different bands of the Sioux Nation of Indians,' they are recognized in their dual capacity as a nation and as separate bands composing the nation. And when that national or tribal relation has been established by the political departments the courts are bound by it. (United States *v.* Holliday, 3 Wall. 407.) Not that Indians under treaty relations only are suable under the act of 1891, but that by such treaties the relations of the Indians in their organized or tribal capacity is thereby fixed and recognized." (Kansas Indians, 5 Wall. 737).

It is insisted, however, that there must be some political recognition of the national character of the Indians. If by treaty, that must govern. If by appropriations for their support, where divisions are recognized which do not appear in treaty, these are within the terms of the act of 1891. Whenever a division appears as duly recognized by the political department of the Government whereby the treaty-making power is conceded or the right to hold separate tribal funds, then the courts may treat these Indian parties as bands, tribes or nations within the meaning of the act of 1891. They are to be charged in the petition, their amity is to be alleged and proved, their responsibility for the depredation is to be fixed by the judgment of the court and their funds are to answer.

CONCLUSION.

The framers of this act, finding the Indian tribes described in treaties sometimes as nations, sometimes as tribes, sometimes as bands, desired to avoid any uncer-

tainty as to the amity to be found by using all three synonymous words in the opening of the act; after that, the less used words were dropped and the single comprehensive word "tribe" stood throughout the act for them all. Each word means alike an organization having a distinct national existence. Nationality can not be newly acquired by union for breaking the law or laid down when too close pursuit renders law-breaking impracticable.

WILLIAM B. KING,
W. H. ROBESON,
Attorneys for Appellant.

No. 43.

Reply Brief of King v Robertson

Office Supreme Court U.S.
FILED
DEC 6 1900
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

Filed Dec. 6, 1900.

EUTIMIO MONTOYA, surviving partner,
v.
THE UNITED STATES *et al.* } No. 43.

BRIEF FOR APPELLANT IN REPLY.

The learned and enlightening brief of the Assistant Attorney-General is of great aid in bringing to a clear issue the exact points in controversy. His positions are substantially as follows:

I. He maintains (pp. 30–36) that the appellant has made erroneous conclusions of fact from the findings, as to the character of Victorio's band.

II. He has accepted the definition by the appellant that the word "band" is similar in meaning to "tribe" and "nation" in requiring national character.

III. He insists that the facts found show Victorio's band to possess this national character.

The Court of Claims defined "band" (appellant's brief, pp. 3, 4) as different in kind from "tribe" or "nation." The appellant's opening brief was devoted to combatting that definition. The brief of appellees, substantially accepting the definition of the appellant's, and stating the defence to be largely a question of fact (appellees' brief, p. 35), has changed the issue from one of definition and renders a further brief essential. The points above will therefore be discussed in order: (1) the character in fact of Victorio's band as disclosed in the findings; (2) the exact criterion fixed by the defendants for a "band" as

used in the statute and (3) whether the facts warrant the inclusion of Victorio's band within a proper definition of the statutory term.

I. The Facts.

The appellant asserts that the findings of the Court of Claims show:

(a) That membership in Victorio's band was not permanent, but was made up of persons retaining membership in their tribes.

(b) That the band's only separate existence was for the purposes of disorder stated in the findings.

(c) That it had no geographical location.

Composition of the Band.

The statements of Finding III (Rec. 2) as to the number in the band and their tribal membership may be reduced to tabular form as follows. The table begins in April, 1879, as hostilities ceased in December, 1878, and the Indians were quiet until the next April.

DATE.	NUMBER.	TRIBE.
1879		
April	22 in all	Chiracahua
May and June	Additions, not numbered	"
June 30	13 in all	"
July	13 and "a few" others	Chiracahua and Southern Apaches of Gila, Membres and Mongollon tribes.
1880		
March	About 200	Chiracahuas, Southern Apaches, Mescaleros and Mexican Indians.
April	200–250	Additional Mescaleros.
During Summer	Diminishing numbers	
October	Band scattered and the remnant annihilated	

These figures are carefully taken from the statements of Finding III on pp. 3 and 4 of the record. They show very plainly the fluctuating number and the varying constituency of the band. They amply justify the appellant's statement's (brief, pp. 23, 27) that the relation of the members to it was temporary, while that to their tribes was permanent. The appellee's brief combats this view vigorously (pp. 31–33) and seeks to sustain its contention by supplying from the opinion facts not stated in the findings. But this course is distinctly inhibited by this court in Stone *v.* United States, 164 U. S. 383.

The Court of Claims recognizes the Indians who committed this depredation as Mescalero Apaches, and finds that before they joined Victorio's band they were members of the Mescalero tribe. But when Victorio's band was scattered, where else could those Mescaleros go except back to their own people? It nowhere appears that they severed their relations to their tribe by associating with Victorio.

The Band's Existence Temporary.

The band itself had no separate existence previous to the organization for violence described in the findings. There were hostilities by Chiricahuas, "including Victorio," in 1876, continuing to December, 1878 (Finding III, Rec. 3). Victorio first appears as a leader, in February, 1879, of twenty-two followers. It was not until July that he had any considerable following from various tribes.

The only separate existence which the band had was for the acts described in the finding in these words: "marauding, destroying property and killing citizens," and for acts embraced in the phrase: "They continued their warfare." The purposes of the band are summarized as follows (Rec. 4):

"These Indians were allied together under the name of Victorio's band for the purpose of aiding Victorio and his followers in their hostile and warlike acts against the citizens and the military authorities of the United States."

That is to say, they combined attacks against private persons and property with resistance to forces sent to subdue them. No *quasi* public purpose is shown. The organized resistance of the Chiricahua Indians to avoid removal had ceased in December, 1878, but this band of mixed Indians was organized after that without other purpose than disorder. They preferred fighting to the monotony of peace.

"The few remaining" of the band who continued away from their respective reservations were finally killed by the military. The United States employed its army against them as the Dominion of Canada employs its Mounted Police for similar purposes. The use of the army was to put down the disorder of these Indians, involving no recognition of belligerent rights or of national character.

The existence of the band itself as an organization possessing any attributes of political independence whatever began in purposes of disorder, whether called "marauding" or "warfare," and ended when that disorder was made impossible by pursuit.

The Band Had No Location.

The want of any fixed locality is shown by the findings. This band roamed over territory occupied either by white men or by the tribes of which its membership was composed, without any defined situs of its own.

The legal consequences of these facts will be discussed later.

II. The Definition of a Band.

The appellant's brief gives the following definition of a band (p. 4):

"The claimant's contention is that 'band,' named in association with 'tribe or nation,' is substantially of the same meaning as those words in respect to nationality and means a separate political division of a national character, capable of making treaties or conventions, of holding tribal funds and of declaring war and so recognized by the legislative or executive department of the Government. The claimant asserts that a party of outlawed Indians, made up either from a single tribe or scattered renegades from different tribes, does not constitute such a band. By national character is meant that appropriate to a domestic dependent nation (Cherokee Nation *v.* Georgia, 5 Pet. 1, Rec. 8)."

The definition by the Court of Claims is given on the same page.

The Concessions by the Appellees.

The Assistant Attorney-General admits that the meaning of the words "band, tribe or nation," in this statute is not that of ordinary literature, to be found in dictionaries. He says (brief, pp. 6, 7):

"The meaning of these terms must be derived from usage. Fortunately, we have the long-continued use of all of them in treaties, official documents, opinions of the courts, and historical writings."

His elaborate study of the authorities cited in his brief (pp. 3–15), confirmed by those cited in appellant's brief (pp. 5–27), has led him to recognize very frankly the position of the appellant, that the "band" named in the statute is identical with "tribe or nation" in the requirement of national character. He is forced from the extreme position of the Court of Claims to a definition in all essentials that of the appellant. He says (brief, p. 9):

"If we pursue further the distinctions which we have assumed to exist between nation and tribe and tribe and band, we find that the band is an aggregation of Indians in many cases differing in no respect from a tribe, as in the case of the Ogallala band or tribe of Sioux. In other cases it is smaller and less prominent, or less ancient in its origin than most tribes, although still differing in no respects from other tribes."

He says again (p. 22):

"In the last analysis the distinctions between band and tribe and tribe and nation vanish."

On p. 23 he admits that it may be granted as an abstract proposition that the words "band, tribe or nation" in the act of 1891, mean no more than the word "tribe" in the act of 1834.

"The appellees accept the conclusion that the word 'band' has a similar meaning to the words 'tribe' and 'nation'; but to be similar is not to be identical" (p. 25).

"The use of the word 'band' indicates a knowledge on the part of Congress of the possible or actual existence of an independent political organization among Indians which was not fully described by the word 'tribe,' though in all essential respects resembling a tribe" (pp. 25, 26).

In selecting these passages, we would invite attention in each case to the context to avoid any chance of misinterpretation of detached passages.

On p. 34, he accepts our definition of "band" in its application to this case and maintains that the facts bring Victoria's band within it.

The Appellees' Tests of a "Band."

What then is the test which the appellees insist upon as the essential of a "band"? It must be one common alike to band, tribe or nation, since he has conceded

that "in the last analysis the distinctions vanish" and that the "political organization" described as a band is is one "in all essential respects resembling a tribe." There are two found in the brief.

The first is the band's independence. This is suggested on p. 6, as "independence of other Indian authority." The brief says (p. 23) that in ascertaining the amity of a tribe the court

"Would look to the actual independent political body, under whatever name, and its status with reference to amity would determine the jurisdiction of the court."

This test is finally stated with precision on p. 27:

"In the opinion of counsel for the appellees the test to be applied is that of independence. By this is meant not absolute independence, which no Indian State has, or ever had after the advent of the Caucasian race, but independence of other Indian authority."

This is the best defined position of the appellees. There is yet another, more or less openly asserted, approaching nearer to the position of the Court of Claims. It is that the fact of hostility creates nationality. This idea is not willingly asserted, because it is inconsistent with the definition of a band as involving nationality, which the learned Assistant Attorney-General has already clearly admitted. The position is evidently taken because it is the only one which will include Victorio's band. It first appears on page 4, where it is said:

"A band of Indians might be confederated together even for an unlawful purpose—so long as it did not involve hostility to the United States—without bringing themselves within the meaning of the statute."

This parenthetical clause is clearly intended to claim that active hostility *ipso facto* gives national character to the hostile party. This is stated on page 23, where it is

said that the statute provides indemnity for depredations committed:

"Whenever any organized and armed Indian opposition to the United States' authority and forces is in the field, persisting for a period of years under the same organization and the same leaders in the policy of war against the United States."

Thus we have the appellees' positions shown:

(a) "Band" implies nationality.

(b) The test of nationality is independence of other Indian authority.

(c) Hostility creates nationality.

III. The Legal Consequences.

These positions of the appellees being made plain, they can be discussed in their relation to the facts found by the court. We have seen that the band led by Victorio had no territory, no exclusive membership, and existed only for purposes of violence.

No Nation Without Territory.

It can not be maintained that savage tribes must have absolutely accurate boundaries. But it is a fact of history that the Indian tribes have always had general territorial boundaries within which they lived and hunted. Thus in the earliest history of the country the boundaries of the Six Nations, of the Choctaws, Chickasaws, Creeks and Cherokees and other greater or less tribes were recognized (see treaties cited, appellant's brief, pp. 5, 6). The object of many of the early treaties was to reduce to writing previously known but inaccurately defined boundaries. It was equally so in later years with the western tribes. Boundary disputes frequently arose among the Indians. One of the most celebrated Indian treaties, that of Fort Laramie of 1851 (Revised Indian Treaties, 1047), was de-

voted to defining the respective territories of the Sioux, Crow, Cheyenne and Arapahoe and other great nations of Indians.

The very Apache Indians named in the findings furnish a striking instance of tribal possession of fixed territory. One tribe takes its name from the Gila River, one from the Mimbres River and one from the Mogollon Mountains. Others of the names cited on page 16 of appellees' brief will at once be recognized as geographical.

There is then a great discrimination to be drawn between the national character of a tribe or band occupying territory on the Gila River or in the Mogollon Mountains and one like Victorio's band, claiming and having no territory. As a body it had no place; its several members had a right on the reservations or other territory of their respective tribes. What aspect of nationality has an organization without territory, made up of members who have each a place in his own tribe? Yet even the Court of Claims seeks to find a semblance of nationality in the "company of persons united in any common design" in order to bring the "band" within this statute, and the learned counsel for appellees finds that his researches oblige him to define a "band" as in all essentials equivalent to "tribe or nation."

No Separate Membership.

Even of greater importance is the manner of composition of this band. It was picked up out of several existing bands and tribes. Its membership was composed of those who came from the Chiricahua, Mescalero, Gila, Mimbres, Mogollon and other tribes. They returned to these when their period of law breaking and resistance to authority ceased. There was no abandonment of tribal relationship in joining Victorio's band.

Existence Solely for Disorder.

We have seen that the existence of Victorio's band began and continued for disorder only, without other purpose.

There is nothing to indicate that the new nation supposed to have been created under Victorio's leadership from many scattered tribes would have remained a single body had the vigor of its hostilities convinced the authorities of the United States that its desires, if any definite desires were made known, should be granted.

It seems unnecessary to argue that disorderly resistance to authority can not create a nation. Something more is essential,—the possession of territory, the adherence of citizens for the formation of a permanent state, the successful organization of something beside a fighting force. What corresponds to these in the weaker bonds of savage society must exist to constitute a savage "band, tribe or nation" in the admitted meaning of the statute.

National character is surely wanting even in an Indian band or tribe where the organization, unlike all other similar Indian organizations, has no territory of its own, has no membership independent of membership in other tribes and has no elements of national permanence. Having abandoned the literary definition of the word "band," it is not possible to accept hostility alone, even long continued, as creating the national character accepted by the Assistant Attorney-General, as equally essential to "band, tribe or nation."

The essential error in the argument of the Assistant Attorney-General on this point (brief, pp. 22, 23) is that he reads the statute as if it made the existence of any hostilities fatal to the jurisdiction. It is tribal hostility by the depredator's "band, tribe or nation" which takes away jurisdiction. The claim must be admitted to juris-

diction unless the depredator's band, tribe or nation, in the national sense conceded to these words, is hostile.

A nation is entitled to belligerent rights because it is a nation, not because it carries on a war. A discussion of the recognition of belligerent rights is in our original brief (pp. 28–33).

Victorio's Band Not Independent.

The test of independence of other Indian authority proposed by appellees can not be applied to this band. What independence has a band or nation which has no recognized territory of its own, and is an intruder wherever it locates? What independence has a band whose members are all members of other bands or tribes and who are subject to such laws and customs of their own tribes as savage life imposes?

IV. The Depredators were Mescaleros, a Tribe in Amity.

There is another view of this case which is suggested and somewhat discussed in the opening brief for appellant (p. 27), but needs restatement and amplification. The Court of Claims has made this finding (Rec. 4):

"On the twelfth of March, 1880, the property set forth in Finding II was stolen and driven away or destroyed by the Mescalero Apache Indians, who were at the time allied with Victorio's band for the purpose of hostility and war as aforesaid, and that said band so constituted was not at the time of said depredation in amity with the United States.

"But the Mescalero tribe, then on their reservation near Fort Stanton, about 100 miles distant from the scene of the depredation, and to which the Mescaleros who committed the depredation had belonged before they joined Victorio's band, was in amity with the United States."

The statute on which the jurisdiction of the court rests in this case (appellant's brief, p. 1) requires the adjudication of claims for property "taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States." The Court of Claims finds that the Indians who took this property were Mescalero Apaches and that the tribe to which they belonged was in amity. Nothing more is needed to complete the jurisdiction of the court. It is not found that the alliance of these Indians with Victorio's band deprived them of their membership in the Mescalero Apache tribe. If they were members both of the Mescalero Apache tribe and of Victorio's band, even conceding this to be a band within the meaning of the statute, no reason can be assigned why the hostility of that band should control the responsibility of the tribe.

The Assistant Attorney-General admits (p. 39) that the "Mescaleros were bound to restrain their own members." He seems to think that he has answered the charge that this responsibility extended to preventing their members from joining a hostile band like Victorio's by saying that the Mescaleros "were not obliged to go to war with Victorio's band to reclaim former members of their tribe who had joined that band."

The theory of the act of 1891 and its predecessors is that the Indian tribe must answer for the wrong doings of its members while the tribe is in amity. It was equally its duty to prevent its members from joining other evil-disposed Indians as to prevent them from depredations on their own account. The tribe should be held answerable in this case because it had permitted its members to ally themselves with the turbulent element of another tribe and in so doing they had committed depredations upon the property of citizens.

V. The General Purpose of the Act.

The purpose of Congress has been to draw the line of tribal responsibility between losses in amity and losses in hostility, but the test of tribal responsibility is tribal amity and tribal hostility. The national meaning of the word "band" is no longer disputed, an organization "in all essential respects resembling a tribe" (appellees' brief, p. 26). The body whose amity is to be determined where unruly members of different tribes conspire together, is the body possessing permanent national characteristics and not the temporary and unlawful organization.

It is unfortunate that the Court of Claims did not adhere to the rule announced in the case of Leighton *v.* United States, 29 C. Cls. 326:

"Where a small party of Indians or a minority of a tribe, without the consent of such tribe, engage in such a raid, though they encounter United States troops and engage them in battle, the condition of amity between such tribe and the United States will not thereby be changed.

In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

In asking this Court to reverse the judgment of the Court of Claims in the pending case we are asking the affirmance of the doctrine laid down in the case just cited. The earlier view of the court below is sounder than the later.

William B. King,
W. H. Robeson,
Attorneys for Appellant.